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Civil Procedure And Evidence—Trial de Novo—Availability

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justification is present to grant an injunction to restrain a defendant from procuring a foreign country decree of divorce, the justification being that such a decree may be used to jeopardize the rights of the aggrieved spouse.

In the opinion of the writer the minority presents a more liberal view, because until the Mexican divorce decree is declared null and void, the aggrieved spouse's status is in doubt and she may be placed in an unfavorable light in the community in which she lives.

Trial De Novo—Availability

A trial de novo is defined as a new trial or retrial had in an appellate court in which the whole case is gone into as if no trial whatever had taken place in the court below.⁶⁹ In *Hughes v. Board of Education*⁷⁰ the Court of Appeals was faced with the question of whether a college professor, having been dismissed by the Board of Education because of Communist party membership, was entitled to a trial de novo. New York has adopted three statutes pertaining to the removal of public school teachers for treasonable or seditious acts or utterances.⁷¹ The Civil Service Law⁷² enables a person dismissed under section 12-a to obtain a trial de novo.⁷³

In affirming the Appellate Division's reversal,⁷⁴ the Court of Appeals indicated that a teacher found disqualified pursuant to the Feinberg Law has an election of three methods of review: 1) trial denovo,⁷⁵ 2) limited judicial review,⁷⁶ 3) appeal to the Commissioner of Education.⁷⁷

The Board of Education argued that a full administrative hearing followed by Article 78 proceedings, or in the alternative an appeal to the State Commis-

69. BLACK, LAW DICTIONARY (4th ed. 1951); *In re Breen's Estate* 329 Ill. App. 650, 70 N.E. 2d 90 (1946); *Bardwell v. Riverside Oil & Refining Co.* 139 Okla. 26, 280 P. 1083, 1085 (1929).

70. 309 N.Y. 319, 130 N.E. 2d 638 (1955).

71. N. Y. EDUCATION LAW §3021; N. Y. CIVIL SERVICE LAW §12-a (applicable to all public employees, including teachers); N. Y. EDUCATION LAW §3022, (the "Feinberg Law", which implements the two prior statutes).

72. N. Y. CIVIL SERVICE LAW §12-a(d): "A person dismissed . . . may . . . petition for an order to show cause . . . why a hearing on such charges should not be had. . . . The hearing shall consist of the taking of testimony in open court with opportunity for cross-examination . . ."

73. *Thompson v. Wallin*, 301 N.Y. 476, 95 N.E. 2d 806 (1950), *aff'd sub nom. Adler v. Board of Education*, 342 U.S. 485 (1952).

74. 286 App. Div. 180, 141 N.Y.S. 2d 392 (1955).

75. N. Y. CIVIL SERVICE LAW §12-a(d), note 71 *supra*; see *Thompson v. Wallin*, 301 N.Y. 476, 95 N.E. 2d 806 (1950).

76. N. Y. CIV. PRAC. ACT art. 78, §§ 1283, 1306.

77. N. Y. EDUCATION LAW §310.

sioner of Education, were the only methods of appeal the Legislature intended the petitioner to have. Though the Court of Appeals recognized that a trial de novo is a cumbersome device, it also stated that there are situations where a trial de novo is of right, as when the Public Service Commission prescribes rates to be charged by a utility that are allegedly confiscatory,⁷⁸ or in an action to recover a chattel where the value of the property together with any damages recovered, exceeds one hundred dollars.⁷⁹

The Board of Education also based its argument on the fact that petitioner was dismissed under Education Law section 6206, subdivision 10,⁸⁰ rather than Civil Service Law section 12-a. This, they argued, meant that petitioner's only choice of appeal was to the Commissioner of Education under Education Law section 310. The Court disagreed saying the dismissal was grounded on Civil Service Law section 12-a,⁸¹ in that the professor was dismissed because he was a member of the Communist party, a group which advocates overthrow of the government by force or violence.⁸²

The Court also disregarded the Board's suggestion that "may" in section 12-a(d) meant something less than an absolute right to go to the Supreme Court, Special Term, saying that this interpretation would render section 12-a(d) meaningless. In light of the consequences that could result from a teacher's dismissal, and his possible permanent ineligibility for any state public office, this decision seems correct; the petitioner should be allowed the maximum safeguard, a trial de novo.

Review of Federal Administrative Action

State courts have no power to revise or review, either directly or indirectly, federal governmental action by authorized federal officers performed under authority of acts of Congress.⁸³ *Fieger v. Glen Oaks Village Inc.*⁸⁴ is in line with this principle.

78. *Staten Island Edison Corp. v. Maltbie*, 296 N.Y. 374, 73 N.E. 2d 705 (1947).

79. N. Y. JUSTICE COURT ACT §442.

80. This section allows dismissal for "conduct unbecoming a member of the staff."

81. Section 12a: "No person shall . . . be continued in . . . employment, . . . as teacher in . . . college, . . . who: (a) . . . advocates . . . that government of the United States . . . should be overthrown . . . by force . . . ; or (c) . . . becomes a member of any . . . group . . . which teaches or advocates that the government of the United States . . . shall be overthrown by force or violence, or by any unlawful . . ."

82. *Thompson v. Wallin*, 301 N.Y. 476, 95 N.E. 2d 806 (1950).

83. *Wasservogel v. Meyerowitz*, 300 N.Y. 125, 89 N.E. 2d 712 (1949); *Schmoll, Inc. v. Federal Reserve Bank*, 286 N.Y. 503, 37 N.E. 2d 225 (1941).

84. 309 N.Y. 527, 132 N.E. 2d 492 (1956).